FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 1 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185 - 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND SUPPORTING BRIEF

WILBUR H. FRIEDMAN,
Counsel for Petitioners.

PROSKAUER ROSE GOETZ & MENDELSOHN,
Attorneys for Petitioners,
11 Broadway,
New York 4, N. Y.;
NORMAN S. GOETZ,
EUGENE EISENMANN,
WILBUR H. FRIEDMAN,
ALBERT L. SOLODAR,
Of Counsel.

INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Summary statement of the matter involved	2
Question presented	2
Statute involved	3
Facts	4
Specification of errors	7
Reasons for granting the writ	8
Conclusion	10
Brief in support of petition for writ of certiorari	11
Opinion below	11
Jurisdiction	11
Statement of case	11
Question presented	11
Specification of errors	11
Statute involved	12, 22
Argument	12
I. The portion of the decision for which review is sought is in conflict with numerous decisions of the District and Circuit Courts and of the Court of Claims itself, in failing to award interest as required by 31 U. S. C. § 227 for the entire period payment of the prior judgments was withheld	12
A. The date of April 19, 1941 adopted by the Court of Claims as the date from which interest was to begin to run has no relation to the question of interest on the judgments of the Customs Court in favor of Rayon No. 1 in the Sum of $362,482.71	14
B. The date of April 19, 1941 has no proper relation even to the claim based on Nyrayco's judgments of $30,809.75	16
Conclusion	21
Appendix A (statute involved)	22

CITATIONS

Cases:

	Page
Aluminum Company of America v. *United States*, 87 C. Cls. 96	16
American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717	8, 13
American Steam Conveyor Corp. v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571	8, 13
Basch v. *United States*, 52 C. Cls. 134, 142	20
Colorado Condensed Milk Co. v. *United States*, 70 C. Cls. 671, 48 F. (2d) 682	8, 13
Commercial Loan and Trust Co. v. *Mallers*, 242 Ill. 50, 53	20
Commission v. *Havemeyer*, 296 U. S. 506, 519	10, 20
Concordia Savings and Aid Assn. v. *Read*, 93 N. Y. 474	20
Douglas v. *Perlstein*, 170 Misc. (N. Y.) 561	10, 18
Eisenstadt, Inc., Matter of, v. *Heffernan*, 256 App. Div. 488, aff'd 283 N. Y. 578	18
Hebrew Congregation, etc., v. *United States*, 6 C. Cls. 241, 245	20
Helvetia Milk Condensing Co. v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662; cert. denied 290 U. S. 671	8, 13
Interstate Trucking Co., Inc., v. *Manufacturers Trust Co.*, N. Y. Law Journal, May 2, 1935, p. 2260	10, 17
Klytia Corp. v. *United States*, 72 T. D. 1124 (1937)	10, 18
London Lightin Wares Corp. v. *Norge Realty Corp.*, N. Y. Law Journal, April 23, 1938, p. 1968, Col. 6 (Sup. Ct.)	18
Marford Direct Mailing Co., Inc., v. *Socony Vacuum Oil Co., Inc.*, N. Y. Law Journal, December 8, 1938, p. 2027, Col. 2 (Sup. Ct.)	18
Morse Arms Mfg. Co. v. *United States*, 16 C. Cls. 296	20
Philippine Sugar Estates Development Co. v. *United States*, 39 C. Cls. 225, 237	20

Page

Pyrogravure Co. v. *Staber*, 30 Misc. (N. Y.) 658 20
R. J Reynolds Tobacco Co. v. *United States*, 82 C. Cls. 545, 13 F. Supp. 425 13
Society for Propagation of the Gospel v. *Town of Pawlet*, 4 Pet (29 U. S.) 480, 501 10
Standard Dredging Co. v. *United States*, 71 C. Cls. 218 13
Stewart & Co. v. *United States*, 71 C. Cls. 126 13
United States v. *Insurance Co.*, 22 Wall. (89 U. S.) 99 ..... 10, 20
United States v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.) 8, 13
United States v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th) 8, 13

Statutes:

Act of March 3, 1875 (31 U. S. C. § 227) 3, 8, 13, 22
New York General Corporation Law, Section 29 ..... 17, 18, 19
New York Stock Corporation Law, Section 105, Sub. 8 14
New York Tax Law, Section 203-a 17
New York Rules of Civil Practice, Rule 93, Sub. 2 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,

Petitioners,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review that portion of the judgment of the Court of Claims rendered February 4, 1946 (not yet reported), which fixed April 19, 1941 as the date from which 6% interest was allowed to the petitioners on two prior unpaid judgments against the United States entered in the United States Customs Court on April 30, 1937 and May 6, 1937.

Jurisdiction

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Summary Statement of the Matter Involved

Petitioner, N. Y. Rayon Importing Co., Inc. (#2) (hereinafter called "Rayon #2"), is the successor to two other corporations, N. Y. Rayon Importing Co. Inc. (#1) (hereinafter called "Rayon #1") and Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco"), which recovered judgments in the United States Customs Court against the United States on April 30, 1937 and May 6, 1937 (R. 16). Petitioners, Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, are the liquidating directors and trustees of Rayon #2 (R. 20). As a result of said judgments, it was determined that $393,292.46 was owing by the United States (R. 16).

Checks were issued between August 4, 1937 and February 3, 1938 aggregating $393,292.46 (R. 16), but the Comptroller General of the United States refused to authorize delivery of the checks either to the petitioners or to their predecessor corporations or their liquidating trustees (R. 17, 18).

On April 29, 1943, an action was instituted against the United States in the Court of Claims (R. 20) and judgment therein was entered in favor of the petitioners in the principal amount of $393,292.46 with interest. Although petitioners in their brief before the Court of Claims asked that the interest be awarded from the dates of the respective checks, the Court of Claims awarded interest from April 19, 1941, the date of a New York statute dealing with capacity of an involuntarily dissolved corporation to sue.

Question Presented

The question presented is whether interest should have been granted from the date of the original issuance of the checks, the delivery of which was withheld by the Comptroller General, rather than from a later date.

Statute Involved

The Act of March 3, 1875, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "Sec. 227. Offsets against judgments against United States.—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refused to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

Facts

The facts are not in dispute and were found by the Court of Claims as follows:

Rayon #1 and Nyrayco were engaged in the business of importing rayon yarn and between 1925 and 1929 paid large sums of money for customs duties which had been unlawfully assessed on rayon yarn imported by them. Thereafter, these corporations duly filed protests against said assessments, thereby instituting actions in the United States Customs Court (R. 10).

On March 1, 1930 petitioner, Rayon #2 was incorporated and as part of a corporate reorganization succeeded to all the assets and liabilities of Rayon #1 and Nyrayco (R. 10, 14). At the same time, Rayon #1 was voluntarily dissolved under the provisions of Section 105 of the New York Stock Corporation Law (R. 14, 15), which expressly provided that its corporate existence continue for the purpose of winding up its affairs and that suit could be maintained in the name of the dissolved corporation.

Nyrayco also discontinued its business activities in March, 1930, and was eventually involuntarily dissolved on December 16, 1935 by proclamation pursuant to the New York Tax Law for non-payment of franchise taxes (R. 16). At the time of its dissolution, Section 29 of the New York General Corporation Law likewise provided that a corporation involuntarily dissolved continued in existence for the purpose of collecting its assets and winding up its affairs and might sue in its corporate name.

Petitioner, Rayon #2 continued in business until January 9, 1931, when it was voluntarily dissolved under Section 105 of the New York Stock Corporation Law (R. 15).

On April 30, 1937 and May 6, 1937, two judgments were entered in the United States Customs Court, allowing the

various protests filed by Rayon #1 and Nyrayco prior to their dissolution. Under these judgments it was determined that refunds were owing to Rayon #1 in the amount of $359,548.96; to Richard Shipping Corporation, as customs broker of Rayon #1, in the sum of $2,983.75; and to Nyrayco in the sum of $30,809.75 (R. 16). Checks for the refund of the excessive customs duties were drawn by G. F. Allen, Chief Disbursing Officer of the United States, on the Treasurer of the United States payable to the order of Rayon #1, Richard Shipping Corporation and Nyrayco (R. 16). Delivery of these checks was not made, however, by the Collector of Customs because the importing corporations, Rayon #1 and Nyrayco and Rayon #2, the successor corporation, had been dissolved and the checks were turned over to the General Accounting Office (R. 17).

Demands for payment were repeatedly made upon the General Accounting Office by the various corporations and their liquidating directors, who offered to sign consents and releases if payment were made either to the successor corporation, Rayon #2, or to the predecessor corporations, Rayon #1 and Nyrayco, as the Government might prefer (R. 17, 18).

This office, however, refused to approve of the delivery of the checks or payment to anyone (R. 17, 18). After extensive negotiations and correspondence over a number of years, suit was finally brought in the Court of Claims (R. 20).

Three separate actions in the Court of Claims were instituted on April 29, 1943 by Rayon #2 and its liquidating directors, by Rayon #1 and its liquidating directors, and by Nyrayco. The actions were consolidated and tried together (R. 20). Although the Government had had the matter under consideration since 1937, on the trial it offered no evidence of any kind to controvert the docu-

mentary and oral evidence given on behalf of the plaintiffs.

In its brief and argument before the Court of Claims, the Government conceded the validity of the transfer of assets in 1930. including all refund claims, to Rayon #2 and admitted its obligation to pay $362,482.71 on account of the refund claims originally filed by Rayon #1 and its customs broker (R. 23).

The Government did not dispute that Nyrayco had overpaid its customs duties by $30,809.75, but took the technical position that the judgment entered in Nyrayco's name in the Customs Court in 1937 was void because of its involuntary dissolution in 1935 (which, incidentally, was five years after transfer of its assets to Rayon #2 in 1930).

The Court of Claims overruled these technical objections, pointing out that decisions of the New York courts and the Customs Court itself had held that, under New York law, even corporations dissolved for non-payment of taxes could maintain suit (R. 24, 25).

The Court also pointed out that any doubt as to the meaning of the New York Tax Law dealing with involuntary dissolution of corporations was dispelled by the adoption on April 19, 1941 of an amendment to the Tax Law reading as follows:

> "The provisions of Section 29 of the General Corporation Law shall apply to any corporation heretofore or hereafter dissolved under this section."

The Court of Claims then considered the question of interest and wrote (R. 25):

> "This amendment had the effect of removing any defects and uncertainty. It made clear the right of corporations dissolved under the tax law to maintain suits or be sued. By its terms it was made applicable to corporations theretofore dissolved. After April 19,

1941, the effective date of the amendment, there is no reason why Rayon #2, the owner of the two judgments, should not receive interest calculated from such date.

"We can fully appreciate the desire of the General Accounting Office to protect the interests of the Government. This is as it should be. But the nation as well as the individual should be and usually is anxious to settle its just obligations. It has been known since 1937 that this money does not belong to the Government. In the confusion care was naturally exercised. But all the interested claimants seem anxious to get the matter settled. Various offers were made which were rejected without any counter suggestion. These included offer of transfer or assignment and request for suggestions by liquidating directors and trustees. It was not until 1942 that suit in this Court was suggested by the defendant.

"It rather seems if officials of the General Accounting Office had been desirous of getting the matter disposed of they could have permitted transfers and assignments by all interested parties, or if this was not sufficient it could have suggested at an earlier date, that an additional suit would be necessary. At any rate, four years seems a reasonably sufficient time to determine ownership of all parties. This is an added reason, at least persuasive, why the judgments of the Customs Court should bear interest after April 19, 1941, when all question of the capacity of plaintiffs to maintain suit was removed by the amendment to the New York law."

Specification of Errors

1. The Court of Claims erred as to the time from which interest was to run by erroneously fixing April 19, 1941 instead of the dates on which the checks were drawn.

2. The Court of Claims erred in failing to fix as the starting dates for the allowance of interest the dates on which

the checks were drawn, payment of which was withheld by the Comptroller General.

Reasons for Granting the Writ

The Government has indicated that it intends to ask for a writ of certiorari to review the action of the Court of Claims in allowing any interest. If the question of interest is to be reviewed by this Court, a writ of certiorari should be granted to the petitioners as well, for the ruling of the Court of Claims, although correct in awarding interest, was erroneous insofar as it fixed the date from which interest ran as April 19, 1941 instead of the earlier dates on which the checks were drawn.

The Act of March 3, 1875, 31 U. S. C. 227, provides that interest should run "for the time it [payment of a judgment] has been withheld from the plaintiff" by the Comptroller General.

American Potash Co. v. *U. S.*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), the principal authority relied on by the petitioners, held that under the above section, interest should run from the date of the issuance of the checks, payment of which was later stopped by the Comptroller General. Numerous other cases, e. g., *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th); *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.); *Colorado Condensed Milk Co.* v. *United States*, 70 C. Cls. 671, 48 F. (2d) 682; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 671, have held that where the Act of March 3, 1875 applies, interest runs from the time payment of the amount due by the United States has been withheld from the plaintiff.

The date of April 19, 1941, adopted by the Court of Claims as the date from which interest was to begin to run, has no proper relation to the question. It was merely the date on which an amendment to the New York Tax Law removed certain possible ambiguities as to the rights of involuntarily dissolved corporations to sue. The ruling of the Court of Claims is in conflict with its own prior rulings and the rulings of the District and Circuit Courts above cited, since payment had been withheld by the Comptroller General since 1938 (R. 17).

In the instant case there was never any question as to the capacity and power of Rayon #2 to maintain suit. This corporation had been voluntarily dissolved and had acquired the customs claims of Rayon #1 and Nyrayco prior to its dissolution and prior to the dissolution of these predecessor companies.

Moreover, while it is true that Nyrayco was involuntarily dissolved, the judgments entered in the name of Nyrayco only related to $30,809.75. The remainder of the claim involved in this action arose out of the customs refund rights of Rayon #1, involving judgments of the Customs Court amounting to $362,482.71. There was never any question as to the capacity of Rayon #1 to sue in the Customs Court for that corporation had been voluntarily dissolved and the Government itself recognized before the Court of Claims that there was an unquestioned obligation to pay this sum. Accordingly, even if the April 19, 1941 date might have some significance in relation to the Nyrayco claim, it had no possible relation to the refund claim based on the protests originally filed by Rayon #1, and interest should have been allowed on that claim, at least as far back as the time when the checks in payment of the Customs Court judgments were drawn and withheld.

Even as to the Nyrayco claim, however, there was no justification for delaying the running of the interest until April 19, 1941, since the law of New York at the time of the judgment and thereafter was that Nyrayco never lost its capacity to sue and a judgment entered under the circumstances herein involved could not properly be attacked (*Klytia Corp.* v. *United States*, 72 T. D. 1124; *Interstate Trucking Co.* v. *Manufacturers Trust Co.*, N. Y. L. J. May 2, 1935, p. 2260; *Douglas* v. *Perlstein*, 170 Misc. (N. Y.) 561; particularly where prior to the judgment no objection had been made on the ground of Nyrayco's involuntary dissolution (a matter of public record). (*United States* v. *Insurance Companies*, 89 U. S. 99, 101; *Society for Propagation of the Gospel* v. *Town of Pawlet*, 4 Pet. (29 U. S.) 480, 501; *Commission* v. *Havemeyer*, 296 U. S. 506, 519.)

Conclusion

WHEREFORE, in the event this Court grants the petition of the United States for a writ of certiorari the petitioners respectfully submit that this cross-petition for a writ of certiorari should likewise be granted.

Dated: May 1, 1946.

WILBUR H. FRIEDMAN,
Counsel for Petitioners.

PROSKAUER ROSE GOETZ & MENDELSOHN,
Attorneys for Petitioners,
11 Broadway,
New York 4, N. Y.

NORMAN S. GOETZ,
EUGENE EISENMANN,
WILBUR H. FRIEDMAN,
ALBERT L. SOLODAR,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,

Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The opinion of the Court of Claims has not yet been reported.

Jurisdiction

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The petition for certiorari was filed May 1, 1946. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Statement of Case. Question Presented. Specification of Errors

A sufficient statement of the case, the question presented and the specification of errors will be found in the accom-

panying petition and in the interest of brevity will not be repeated.

Statute Involved

The provisions of the Act of March 3, 1875, 31 U. S. C. 227, are printed in Appendix A, *infra*, page 22.

ARGUMENT

Point I

The portion of the Decision for which review is sought is in conflict with numerous decisions of the District and Circuit Courts and of the Court of Claims itself, in failing to award interest as required by 31 U. S. C. Sec. 227 for the entire period payment of the prior judgments was withheld.

The Government has the use of the $393,292.46 paid to it as excessive customs duties for more than sixteen years, the last payments of customs duties having been made in 1929 (R. 10).

The exact amount due was determined when the customs duties were reliquidated pursuant to the judgments of the Customs Court dated April 30, 1937 and May 6, 1937 (R. 16).

Following this reliquidation, checks were drawn by the Chief Disbursing Officer of the United States on the Treasurer of the United States on various dates from August 4, 1937 to February 3, 1938 in the aggregate amount of $393,292.46, which checks were transmitted to the General Accounting Office for lawful disposition (R. 16, 17).

However, in 1938 the General Accounting Office refused to deliver the checks (R. 17), and after years of fruitless negotiations with the General Accounting Office, this action was instituted in the Court of Claims.

The provisions of the Act of March 3, 1875, 31 U. S. C. Section 227, are clear that where interest is to be awarded against the United States, it shall be "from the time it [payment of the prior judgment] has been withheld from the plaintiff."

In every prior case in which interest was allowed under the Act of March 3, 1875, by the Court of Claims and the District and Circuit Courts, interest was held to run from the date when payment was withheld by the Comptroller General, regardless of whether he in good faith believed he was justified in withholding payment.

United States v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th);

United States v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.);

American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717;

American Steam Conveyor Corp. v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599;

R. J. Reynolds Tobacco Co. v. *United States*, 82 C. Cls. 545, 13 F. Supp. 425;

Colorado Condensed Milk Co. v. *United States*, 70 C. Cls. 671, 48 F. (2d) 682;

Helvetia Milk Condensing Co. v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 671;

Stewart & Co. v. *United States*, 71 C. Cls. 126;

Standard Dredging Co. v. *United States*, 71 C. Cls. 218.

We have found no authority to the contrary.

A

THE DATE OF APRIL 19, 1941 ADOPTED BY THE COURT OF CLAIMS AS THE DATE FROM WHICH INTEREST WAS TO BEGIN TO RUN HAS NO RELATION TO THE QUESTION OF INTEREST ON THE JUDGMENTS OF THE CUSTOMS COURT IN FAVOR OF RAYON NO. 1 IN THE SUM OF $362,482.71.

April 19, 1941, the date selected by the Court of Claims as the date from which interest was to run, was the date when the Governor of New York approved an amendment to the New York Tax Law, removing all possible question whether corporations previously involuntarily dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits.

This date is totally irrelevant as to the claim for $362,482.71, based on the Customs Court judgments in favor of Rayon #1, for no question as to capacity to sue has ever existed in relation to Rayon #1 and its successor, Rayon #2, since these corporations were not dissolved involuntarily under the Tax Law but were voluntarily dissolved in accordance with Sec. 105 of the New York Stock Corporation Law (R. 15).

The right of *voluntarily* dissolved New York corporations to maintain suit to collect their assets has never been disputed (New York Stock Corporation Law, Sec. 105, Sub. 8).

In fact, the Government has never questioned the validity of the Customs Court judgments entered on the Customs Claims of Rayon #1, and in its brief in the Court of Claims the Government not only conceded that payment must be made of the sum of $362,482.71, but also that there was no objection to having judgment run in favor of Rayon #2, the successor in interest of Rayon #1.

The only question raised by the Government in the Court of Claims (aside from interest) was as to the validity of the Customs Court judgments for $30,809.75 entered in

favor of Nyrayco after Nyrayco had been dissolved involuntarily for non-payment of New York franchise taxes. The Court of Claims agreed that the judgments in favor of Nyrayco were valid (R. 25) but held that interest should run from the date of the final amendment of the Tax Law since by that date at least the General Accounting Office should have realized that there was no justification for further withholding (R. 25, 26).

But since the $362,482.71 of Rayon #1 customs claims was not in the slightest degree affected by any question of capacity to sue, and as the validity of the Customs Court judgments entered on these claims has never been questioned, it is plain that the date of April 19, 1941, is totally irrelevant, and that interest should have been allowed, at least on the claim for $362,482.71 from the date payment was withheld by the General Accounting Office.

The Court of Claims in its discussion of interest apparently failed to discriminate between the much larger judgments of Rayon #1 (whose validity even the Government never impugned) and the much smaller Nyrayco claim. The only reason given for not allowing interest from 1938 was a reference to "the maze of reorganizations and transfers" (R. 25).

This statement, we respectfully submit, is totally unsupported by the record. There was but one reorganization, as part of which there was one transfer of all assets by Rayon #1 and by Nyrayco, to Rayon #2, the successor corporation (R. 10, 14).

So simple was the factual situation as to reorganization and so clearly proved by the documentary record that the Government did not even offer any evidence at the hearings, and the unequivocal findings of the Hearing Commissioner were accepted by all parties.

Moreover even where a complicated reorganization situation has existed interest has been allowed (*Aluminum Company of America* v. *United States*, 87 C. Cls. 96, 97).

Certainly, the April 1941 amendment to the Tax Law had not the remotest relation to the Government's obligation to pay the Customs Court judgments in favor of Rayon #1 amounting to $362,482.71, and interest should have been allowed at least on this amount from the earlier date when the General Accounting Office improperly withheld payment.

B

THE DATE OF APRIL 19, 1941 HAS NO PROPER RELATION EVEN TO THE CLAIM BASED ON NYRAYCO'S JUDGMENTS OF $30,809.75.

Even as to the $30,809.75, involved in the Nyrayco Customs Court judgments there was no justification for delaying the running of interest to April 19, 1941.

While the Court of Claims felt that by that date any conceivable question as to the validity of the Nyrayco judgments was removed, the law was clear, and the Court of Claims so held, that these judgments entered in 1937 were valid and not subject to attack (R. 23-25).

(1)

Under New York law, Nyrayco at times had capacity to sue

Nyrayco had instituted suit in the United States Customs Court on its claims years prior to its dissolution. It had assigned all its assets, including these claims, to Rayon #2, in 1930, as part of the corporate reorganization, long prior to its dissolution.

The fact that in 1937, when the judgments were finally entered in the Customs Court, Nyrayco had ceased to do business and had been dissolved by proclamation under the New York Tax Law for non-payment of franchise taxes, did

not in any way affect the validity of the Customs Court judgments, which actually belonged to Rayon #2.

The amendment to the Tax Law of 1941 merely clarified what had previously been law.

While in 1937, when the Customs Court judgments were entered, Sec. 203-a of the Tax Law providing for the involuntary dissolution of corporations failing to pay franchise taxes did not expressly mention suits by such corporations, Sec. 29 of the New York General Corporation Law, which was in effect at the time of the dissolution of Nyrayco and at all times since, read as follows:

> "Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets, and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. • • •"

The authorities both prior to 1937 and thereafter held that suit to collect its assets might be maintained by a corporation dissolved under the Tax Law.

The Supreme Court of New York in *Interstate Trucking Co., Inc.* v. *Manufacturers Trust Co.* (N. Y. Law Journal, May 2, 1935, p. 2260), wrote:

> "This action is brought by a corporation dissolved on December 16, 1929, pursuant to Section 203-A of the Tax Law for non-payment of franchise taxes. The defendant moves to dismiss the complaint on the ground that the plaintiff has no capacity to sue and also asks alternative relief. • • •
>
> "In 1932, Section 29 of the General Corporation Law was amended to provide that 'upon the dissolution of a corporation for any cause, and whether voluntary or involuntary, its corporate existence shall continue for the purpose of • • • collecting and dis-

tributing its assets * * * and it may sue and be sued in its corporate name'. The defendant argues that this section has no application in view of the fact that section 6 of the General Corporation Law provides that if there be in any other corporate law a provision conflicting with any provision of the General Corporation Law or of the Stock Corporation Law, the provisions of such other corporate law shall prevail. The court is of the opinion that section 6 does not apply here, there being no conflict between the provisions of section 203-a of the Tax Law either in its 1929 or 1932 form.

"The motion to dismiss for lack of capacity to sue is accordingly denied. * * *"

Accord:

Klytia Corp. v. *United States*, 72 T. D. 1124 (1937);
Douglas v. *Perlstein*, 170 Misc. (N. Y.) 561 (1939);
London Lightin Wares Corp. v. *Norge Realty Corp.*, N. Y. Law Journal, April 23, 1938, p. 1968, Col. 6 (Sup. Ct.);
Marford Direct Mailing Co. Inc., v. *Socony Vacuum Oil Co., Inc.*, N. Y. Law Journal, December 8, 1938, p. 2027, Col. 2 (Sup. Ct.).

In 1939, some years after the entry of the judgments of the Customs Court here involved, one of the four intermediate appellate courts of the State of New York suggested, in *Matter of Eisenstadt, Inc.* v. *Heffernan*, 256 App. Div. 488, that Section 29 of the General Corporation Law did not apply to corporations dissolved for non-payment of franchise taxes under Section 203-a of the Tax Law. That court, while not holding that such corporations were wholly dead, felt that the Tax Law was intended to penalize them. That case was affirmed without opinion by the Court of Appeals, 283 N. Y. 578, but respondent had urged a number of other grounds for affirmance, and there being no opinion in the Court of Appeals, it is impossible to know on what ground the affirmance was ordered.

To remove the doubts raised by the *Eisenstadt* case, in 1940 the next session of the New York Legislature at the suggestion of the Deputy Secretary of State of New York promptly passed a clarifying law, expressly providing that Section 29 of the General Corporation Law applied to corporations dissolved under the Tax Law, *thus approving the interpretation given by the earlier New York cases.*

To avoid any question that this applied to corporations previously dissolved, the Legislature on April 19, 1941, adopted a further amendment to the Tax Law, making it clear that the provisions of the General Corporation Law applied to any corporation "heretofore or hereafter dissolved under this section."

The Court of Claims itself held (R. 24, 25) that at the time of the entry of the judgments in favor of Nyrayco, the New York law permitted such a corporation to sue and that this has continued to be the New York law. Accordingly, under the authorities, regardless of any question of the good faith of the General Accounting Office, interest ran from the time payment of the judgments was withheld.

(2)

There was no justification for non-payment of the Nyrayco judgments in view of the Government's failure to raise any objection based on Nyrayco's dissolution prior to entry of the judgments in the Customs Court.

Nyrayco's dissolution was a matter of public record. Yet the Government never raised the question until years after the Customs Court judgments had been entered and after checks in payment for such judgments had been drawn and deposited in the Treasury trust fund in Nyrayco's name.

It is well settled that a defense that a plaintiff is not a corporation must be raised by affirmative plea prior to judg-

ment, and that a judgment cannot be collaterally attacked where this defense is not raised.

> "Having failed to do so [to raise the defense in the trial court that the plaintiff was a dissolved corporation], the judgment rendered against him in the name of the defendant in error [the corporation] was a binding and valid judgment, * * *. The judgment in favor of the defendant in error was *res adjudicata* of all the defenses which were or could have been interposed by the plaintiff in error [the defendant] including the capacity of the defendant in error to maintain its suit. (Citing cases.)" *(Commercial Loan and Trust Co.* v. *Mallers,* 242 Ill. 50 at 53.)

Accord:

United States v. *Insurance Cos.,* 22 Wall. (89 U. S.) 99, 101;
Commission v. *Havemeyer,* 296 U. S. 506, 519;
Morse Arms Mfg. Co. v. *United States,* 16 C. Cls. 293;
Basch v. *United States,* 52 C. Cls. 134, 142;
Philippine Sugar Estates Development Co. v. *United States,* 39 C. Cls. 225, 237;
Hebrew Congregation, etc. v. *United States,* 6 C. Cls. 241, 245;
Concordia Savings and Aid Ass'n. v. *Read,* 93 N. Y. 474.

See also:

Pyrogravure Co. v. *Staber,* 30 Misc. (N. Y.) 658;
New York Rules of Civil Practice, Rule 93, Subdivision 2.

Plainly, therefore, the Government's belated attack on the judgments in the name of Nyrayco was technically as well as equitably without merit, and so the Court of Claims held.

The entry of the Customs Court judgments in 1937 was a permanent bar to any future objection based on capacity

to sue, and that being so, the General Accounting Office's refusal to allow payment in 1938 caused interest to run from that time. The mere fact that the General Accounting Office erroneously believed in good faith that there was a legal basis for refusing payment does not relieve the Government from the obligation to pay interest. That was the situation in all of the cases where interest was allowed.

In any event, even if there had been any doubt prior to April 19, 1941, with respect to the claim of Nyrayco, there was no basis for refusing to pay the Customs Court judgments relating to the claims of Rayon #1, as to which even the Government, after years of negotiation, could not advance even a colorable defense.

Conclusion

It is respectfully submitted that in the event this Court grants the petition of the United States for a writ of certiorari, this cross-petition for a writ of certiorari should likewise be granted.

WILBUR H. FRIEDMAN,
Counsel for Petitioner.

PROSKAUER ROSE GOETZ & MENDELSOHN,
Attorneys for Petitioners,
11 Broadway,
New York 4, N. Y.;

NORMAN S. GOETZ,
EUGENE EISENMANN,
WILBUR H. FRIEDMAN,
ALBERT L. SOLODAR,
Of Counsel.

APPENDIX A

The Act of March 3, 1875, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

"Sec. 227. Offsets against judgments against United States—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refused to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."